SUPREME COURT, U. S.

NOV 6 197

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-351

SAVANNAH SUGAR REFINING CORPORATION,

Petitioner,

—v—

ADAM BAXTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

FLETCHER FARRINGTON
HILL, JONES & FARRINGTON
208 East Thirty-Fourth Street
Savannah, Georgia 31401

JACK GREENBERG
MORRIS J. BALLER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Respondent

Of Counsel:

KENNETH L. JOHNSON
Suite 1500
American Building
Baltimore, Maryland

ROBERT BELTON
951 S. Independence Blvd.
Charlotte, North Carolina

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
ARGUMENT—	
I. The Ruling of the Court of Appeals for the Fifth Circuit is Entirely Consistent With This Court's Decision in *McDonnell Douglas Corp. v. Green*	4
II. Petitioner's Racially Discriminatory Promotional Policies Were Not Mandated by State Law	7
III. Good Faith Efforts Which Produce No Results Are No Defense to a Back Pay Award Under Title VII	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:

Ash v. Hobard Mfg. Co., 483 F.2d 289 (C.A. 6)	8
Boles v. Union Camp Corp., 57 F.R.D. 46, 52 (S.D. Ga.)	7
Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399 (C.A. 5)	4
Griggs v. Duke Power Co., 401 U.S. 424	4, 9
Harvey v. International Harvester Co., 56 F.R.D. 47, 48 (N.D. Cal.)	7

PAGE

Johnson v. Georgia Highway Express, 417 F.2d 1122 (C.A. 5) 4

Kober v. Westinghouse Electric Corporation, 480 F.2d 240 (C.A. 3) 7, 8

LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (C.A. 5), cert. denied 409 U.S. 990 8

Local 53, International Association of Heat & Frost Insulation & Asbestos Workers v. Vogler, 407 F.2d 1047 (C.A. 5) 7

Love v. Pullman Co., 404 U.S. 522 4

Louisiana v. United States, 380 U.S. 145 7

McDonnell Douglas Corp. v. Green, 411 U.S. 792 ....3, 4, 5, 6

Manning v. General Motors Corporation, 466 F.2d 812 (C.A. 6) 7, 8

Parham v. Southwestern Bell Telephone Company, 433 F.2d 421 (C.A. 8) 3, 9

Schaeffer v. Yellow Cabs, Inc., 462 F.2d 1002 (C.A. 9) 7, 8

United States v. Jacksonville Terminal Company, 451 F.2d 418 (C.A. 5), cert. denied 406 U.S. 906 .....3, 4, 5, 6

Wernet v. Pioneer Foods Co., 484 F.2d 403 (C.A. 6) 8

Constitution:

United States Constitution, Amendment VII 4

Statutes:

28 U.S.C. § 1254(1) 1

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* 2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-351

SAVANNAH SUGAR REFINING CORPORATION,

Petitioner,

—v—

ADAM BAXTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the district court (Pet. App. pp. 1a-19a)[1] is reported at 350 F.Supp. 139. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. pp. 21a-41a) is reported at 495 F.2d 436. The order of the court of appeals denying rehearing is reprinted at Petitioner's Appendix p. 42a.

Jurisdiction

Jurisdiction of this Court is founded upon 28 U.S.C. §1254(1).

---

[1] This form of citation refers to the Appendix to the Petition for Certiorari filed in this Court on September 27, 1974.

Questions Presented

1. Did the court of appeals erroneously allocate the burden of proof with respect to the relief required in a Title VII case following an uncontested finding of discrimination based upon race?

2. Were Petitioner's discriminatory promotional practices mandated by state law?

3. Did the court of appeals err in holding that, despite Petitioner's efforts to end discrimination, it continued unlawfully to deny promotions to its black employees?

Statement of the Case

Until it begins describing the ruling of the district court (Petition, p. 4), the Statement of Petitioner accurately sets forth the history of this litigation. At that point, however, the Statement strays from the record. It conspicuously omits mention of the district court's ruling that Petitioner's promotional practices violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (Pet. App. 11a-12a), a ruling not contested by Savannah Sugar on appeal.

The Court of Appeals affirmed the district court's finding that Petitioner's promotional policies, in general, violated Title VII, and expressly approved the trial court's adoption of affirmative remedies to cure that discrimination (Pet. App. 30a). It also agreed that Respondent Baxter had not himself been the victim of discrimination in the Company's failure to promote him to the position of Relief Boiler Room Operator. The appeals court did not agree, however, with the trial court's ruling that monetary relief was not required. It held that the trial court had imposed

an improper burden of proof in requiring Respondent to show, in a trial where the issue was whether the Company had discriminated in the first instance, that individual members of the class were entitled to such relief (Pet. App. 33a). The Court of Appeals also ruled that good faith efforts by the Company provided no defense to a back pay award where discrimination continued despite those good faith efforts (Pet. App. 32a).

ARGUMENT

Petitioner is thoroughly confused as to the meaning of this Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, and the decision of the United States Court of Appeals for the Fifth Circuit in *United States* v. *Jacksonville Terminal Company*, 451 F.2d 418 (C.A. 5), cert. denied 406 U.S. 906 (1972). Both those decisions deal with the *order of* proof and the *nature* of proof (separate issues which Petitioner does not recognize as such) required to prove discrimination. Neither of those opinions are addressed—as is the opinion in issue here—to the order or nature of proof required to show the necessity for monetary relief *once discrimination against a class has been shown.* Accordingly, Petitioner's arguments are irrelevant and ill-conceived.

Petitioner suggests that the opinion below is in conflict with those cases which have denied back pay where the employer's discriminatory conduct was mandated by state law. That suggestion is obtuse. Petitioner's further suggestion of similarity between the facts of this case and those of *Parham* v. *Southwestern Bell Telephone Company*, 433 F.2d 421 (C.A. 8), is equally vacuous. There is no reason to grant the writ in this case.

I

The Ruling of the Court of Appeals for the Fifth Circuit Is Entirely Consistent With This Court's Decision in *McDonnell Douglas Corp.* v. *Green.*

The relatively short history of Title VII litigation has spawned three generations of issues. The first generation was born of the procedural aspects of the statute: whether EEOC is required to attempt conciliation before an aggrieved party may bring suit,[2] whether the EEOC may refer to a state agency a charge filed initially with it,[3] whether jury trials are required under the Seventh Amendment,[4] and a host of other such questions. The second-generation issues resolve around what happens to complaining parties after they come to court: what constitutes discrimination,[5] and what manner of proof complainants are required to adduce in order to substantiate their claims.[6] In the third generation of Title VII cases, courts are facing the problem of what to do after a complaining party comes to court and wins, i.e., proves discrimination. The issues presented by this case belong to that third generation.

The egregious flaw in Savannah Sugar's Petition is that it confuses the second-generation issues addressed by this Court in *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, and by the United States Court of Appeals for the Fifth Circuit in *United States* v. *Jacksonville Terminal Company, supra,* with the third-generation questions of relief which form the basis of the opinion below.

---

[2] *Dent* v. *St. Louis-San Francisco Ry. Co.*, 406 F.2d 399 (C.A. 5).

[3] *Love* v. *Pullman Co.*, 404 U.S. 522.

[4] *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122 (C.A. 5).

[5] *Griggs* v. *Duke Power Co.*, 401 U.S. 424.

[6] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792.

In *McDonnell Douglas Corporation* v. *Green, supra*—a second generation case involving only an individual claim of discrimination[7]—this Court held that, with respect to the *order* of proof, the complainant in a Title VII suit has the initial burden of proving discrimination (Step 1). With respect to the *nature* of proof required in Step 1, this Court set forth specifications by which the complainant could have created—and did—a prima facie showing of discrimination. This Court noted, however, that

> The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from the complainant in this case is not necessarily applicable in every respect to differing factual situations. [411 U.S. at 802, n. 13.]

The Court further held that, following plaintiff's *prima facie* showing, the proper *order* of proof requires that the burden shift to the defendant to articulate legitimate, nondiscriminatory reasons for its employment decision (Step 2).

The United States Court of Appeals for the Fifth Circuit in *United States* v. *Jacksonville Terminal Company, supra,* held, with respect to the order of proof, essentially the same thing: the burden of proof was initially on plaintiff to establish a *prima facie* case. With respect to the nature of proof required in Step 1, the Fifth Circuit recognized the principle later established by this Court—that the nature of proof of necessity will depend upon the facts of each case—and held that plaintiff met its burden with its introduction of statistical data. 451 F.2d at 444. With

[7] The court expressly noted that, "The critical issue before us concerns the order and allocation of proof in a private, non-class-action challenging employment discrimination," 411 U.S. at 800. The Court did not address problems of proof arising in class actions where class-wide discrimination practices have been shown.

regard to Step 2, the Fifth Circuit looked to Jacksonville Terminal for a "plausible racially neutral explanation," 451 F.2d at 445—a legitimate, non-discriminatory reason—for its apparently discriminatory policies. In both *McDonnell Douglas* and *Jacksonville Terminal*, the employers were able to meet their Step 2 burden.

The approach of the district court in this case is substantially identical to the approach used in *McDonnell Douglas* and *Jacksonville Terminal*. In essence, the district court found that Respondent met his initial, Step 1 burden of proving discrimination by the introduction of statistical data (see Pet. App., pp. 17a-19a). The court then held that Petitioner failed to carry its Step 2 burden of meeting the *prima facie* showing, because of its lack of objective, ascertainable standards for promotion. It is this Step 2 issue which, as evidenced by its querulous Statement (Petition, pp. 4-8), Petitioner now seeks to relitigate in this Court. Since it took no appeal from the district court's findings, Petitioner can not now be heard to complain that the court of appeals' express approval (Pet. App. 30a) of the district court's findings is erroneous.

It is not the second-generation issue of discrimination which forms the substance of the opinion below, but the third-generation issue of appropriate relief following a finding of discrimination. And, it is upon that issue that the court of appeals differed with the holding of the district court. With respect to the *order* of proof on appropriate relief, the court of appeals held that it was improper to require plaintiff to establish entitlement of individual class members to monetary relief prior to the resolution of the discrimination issue. That holding in no way conflicts with *McDonnell Douglas Corporation* v. *Green, supra, United States* v. *Jacksonville Terminal Company, supra,* or any other Title VII case of which Respondent is aware.

In fact, that holding is in accord with the practice of lower courts both within and without the Fifth Circuit.[8] Not only is the Court of Appeals ruling amply supported by those other cases; it is eminently sensible.

If Petitioner's argument can be read at all to attack the Court of Appeals' approach to the relief issue, it does not, as the titles suggest, assail the court's allocation of the *order* of proof. Rather, Petitioner quarrels with the *nature* of proof which will be required of individual class members to establish their entitlement to back pay. That issue was not before the Court of Appeals, and was wisely and appropriately remanded by it to the district court for that determination to be made. Cf. *Louisiana* v. *United States,* 380 U.S. 145, 154ff; *Local 53, International Association of Heat & Frost Insulation and Asbestos Workers* v. *Vogler,* 407 F.2d 1047 (C.A. 5). The ruling of the Court of Appeals therefore provides no basis whatsoever for issuing the writ.

II

Petitioner's Racially Discriminatory Promotional Policies Were Not Mandated by State Law.

Petitioner argues that, since an award of back pay is within the trial court's discretion, and since the Court of Appeals failed to invoke the magic words, "abuse of discretion" in reversing the trial court (Petition, p. 17), the opinion below creates an "immutable" conflict with *Kober* v. *Westinghouse Electric Corporation,* 480 F.2d 240 (C.A. 3); *Manning* v. *General Motors Corporation,* 466 F.2d 812 (C.A. 6); and *Schaeffer* v. *Yellow Cabs, Inc.,* 462 F.2d 1002 (C.A. 9). Petitioner's argument has no merit. Each

[8] *Boles* v. *Union Camp Corporation,* 57 F.R.D. 46, 52 (S.D.Ga.); *Harvey* v. *International Harvester Co.,* 56 F.R.D. 47, 48 (N.D.Cal.).

of those cases involved sex discrimination claims where the employment practices under attack were mandated by state protective legislation. The denial of back pay in these cases was based on the presumptive constitutionality of state legislative enactments and the fact that their mandatory nature put the employers on the horns of a dilemma from which only a federal court Title VII ruling could release them. Those cases, and a few others like them,[9] comprise the universe of appeals court decisions which have affirmed the exercise of discretion by lower courts in denying back pay, where discrimination and resultant economic loss was proved. Petitioner can take no comfort in those cases. It had a completely free hand to adopt and implement its promotional policies, and was under no state-imposed obligation to allow its all-white supervisory staff to be the sole arbiter of qualifications (See Pet. App. pp. 10a-11a, 30a). The facts of *Kober, Manning* and *Schaeffer* have nothing to do with the facts of this case of voluntary private discrimination. Accordingly there exists no conflict of authorities.

III

Good Faith Efforts Which Fail to Terminate Discrimination Are No Defense to a Back Pay Award Under Title VII.

Petitioner argued below, and the district court so held, that its good faith efforts to end its discriminatory practices was reason enough to deny back pay to those members of the class who had suffered economically as a result of those practices (Pet. App., p. 13a). The Fifth Circuit re-

---

[9] *Ash* v. *Hobart Mfg. Co.*, 483 F.2d 289 (C.A. 6); *Wernet* v. *Pioneer Foods Co.*, 484 F.2d 403 (C.A. 6); *LeBlanc* v. *Southern Bell Tel. & Tel. Co.*, 460 F.2d 1228 (C.A. 5), cert. denied 409 U.S. 990.

versed, holding that neither an employer's beneficence nor his malevolence are proper criteria to apply in determining appropriate relief (Pet. App., p. 32a).

Petitioner argues that the Court of Appeals' reversal has created a conflict with the Eighth Circuit's ruling in *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (C.A. 8). That argument ignores the plain mandate of *Griggs* v. *Duke Power Co.*, 401 U.S. 424, where this Court held that

> . . . good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. [401 U.S. at 432, emphasis the Court's.]

Both the *Parham* court and the court below in this case followed that mandate: they examined the consequences —not the motivation—of the employment practices under attack. In *Parham*, the court found that Southwestern Bell had embarked on a good faith journey toward equal employment opportunity *and had succeeded.* In this case, both the trial court and the Court of Appeals found that, despite Petitioner's good faith efforts, discrimination continued unabated (Pet. App., pp. 9a-10a, 32a).

The Fifth Circuit in this case and the Eighth Circuit in *Parham* used the same analytical approach to determine the relief required. The results were different because the facts were different: Southwestern Bell had stopped discriminating; Savannah Sugar had not. Those differing factual situations do not amount to conflicts of rulings of law. There is therefore no reason to grant the writ on that basis.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the writ should be denied.

Respectfully submitted,

FLETCHER FARRINGTON
HILL, JONES & FARRINGTON
208 East Thirty-Fourth Street
Savannah, Georgia 31401
(912) 233-7727

JACK GREENBERG
MORRIS J. BALLER
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

Attorneys for Respondent

Of Counsel:

KENNETH L. JOHNSON
Suite 1500
American Building
Baltimore, Maryland

ROBERT BELTON
951 S. Independence Blvd.
Charlotte, North Carolina